Petition

81-859

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No. ____

IN THE

Supreme Court of the United States

October Term, 1981

BILL RUCINSKI AND ALFRED MEDINA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit Court of Appeals misinterpret and misapply the case of *Donavon v. Dewey*, — U. S. —, 101 S. Ct. 2534 (1981) in determining that warrantless searches of the logging industry are necessary for the furtherance of Federal interests.

2. Did the contract entered into by the United States Forest Service and the petitioners' lumber company, which contains a standard and mandatory clause permitting Forest Service personnel to arrive unannounced at random intervals, violate the petitioners' Fourth Amendment rights.

3. Can a Federal District Court take into account the physical surroundings, history, and customs of a particular community in evaluating an individual's reasonable expectation of privacy within that community.

4. Did the holding in *United States v. Katz*, 389 U. S. 347 (1967) eliminate or reverse earlier decisions which employed common law property concepts or classifications in determining an individual's Fourth Amendment rights.

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No. .....

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The August 31, 1981, opinion of the Tenth Circuit Court of Appeals is attached hereto as Appendix A. Denial of the Petition for Rehearing Suggestion for Rehearing En Banc is attached hereto as Appendix B. A copy of the request to the Clerk of the Tenth Circuit Court of Appeals to certify and transmit portions of the record is attached hereto as Appendix C. The decision of the United States District Court for the District of Colorado is contained in the reporter's transcript of hearings on motions held on the 3rd day of October 1980, and continued until the 27th day of October, 1980, which is part of the record on appeal and is attached hereto as Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on August 31, 1981. A timely Petition for Rehearing Suggestion for Rehearing En Banc was timely filed and denied on September 24, 1981, and this Petition for Writ of Certiorari has been filed within the time limit prescribed by the United States Supreme Court rules. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18 U. S. C. 641:

Whoever embezzles, steals, or purloins, or knowingly converts to his use of the use or another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or,

Whoever receives, conceals or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined, or converted—

Shall be fined not more than $10,000.00 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100.00, he shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both.

The word "value" means face, par, or market value, or cost price, either full sale or retail, whichever is greater.

The United States Constitution Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

———o———

STATEMENT OF THE CASE

A two count indictment was returned and filed on June 11, 1980, charging the petitioners with violation of Title 18 U. S. C. 641. A Motion to Suppress evidence and testimony was filed by petitioner Rucinski and joined into by petitioner Medina. After holding an evidentiary hearing, the judge of the United States District Court for the District of Colorado, John L. Kane, granted the defendants' motion by oral order on October 27, 1980. On November 20, 1980, the United States filed its notice of appeal from the decision of the United States District Court. The facts underlying the petitioners' Motion to Suppress are as follows:

In March, 1979, an investigation was commenced by the United States Forest Service against the petitioners' logging company. In furtherance of this investigation, on September 12, 1979, an agent of the Forest Service approached a neighbor of the petitioner lumber company and requested permission to go upon his land. The agent

of the Forest Service specifically withheld information from the neighbor regarding the purpose of going upon his land.

Having obtained permission under these circumstances, and without procuring a warrant, two agents of the Forest Service entered upon the neighbor's land to conduct surveillance by means of a telescope and a Pentax camera with a telefoto lens. During the course of this investigation, the agents obtained evidence of improper conduct on the part of the petitioners' lumber company. It should be noted that the petitioners' lumber company is privately owned and located in an isolated valley in South Fork, Colorado. Public access to the lumber company is only allowed on business and there is only one road into and out of the lumber company. Half way up this road, there is a sign which says "NO ADMISSION EXCEPT ON BUSINESS". The area is posted with no trespassing signs and the entire lumber company is surrounded by a barb-wire fence. The residence of petitioner Rucinski is adjacent to the main lumber company office.

Although it was never introduced into evidence, there was some testimony that a contract entered into by the petitioners' lumber company and the United States Forest Service which contained a clause permitting Forest Service personnel to arrive unannounced at random intervals and inspect their business. There was no evidence of any statutory or regulatory scheme or provisions regarding the nature, frequency, or method for these random inspections.

Based upon the foregoing facts, the Judge for the United States District Court ruled that surveillance con-

ducted by the agents for the United States Forest Service constituted an unreasonable search and seizure, and he suppressed the direct results of that surveillance as well as its fruits. In so ruling, the Court held that based upon the particular characteristics of the petitioners' community, the petitioners had a reasonable expectation of privacy which was violated by the surveillance conducted by the Forest Service agents.

The Tenth Circuit Court of Appeals reversed this decision by the United States District Court. In so doing, the Court reached some legal conclusions which, if allowed to stand, will not only create confusion in this area of Fourth Amendment law, but also will have a momentous impact upon the logging industry and other business similarly situated.

In a number of recent cases, this Court has identified a number of businesses or industries, the inspection of which does not require a search warrant due to their specific nature and their history of close supervision and inspection. This waiver of the warrant requirement of the Fourth Amendment has been applied to the alcoholic beverage industry and *Cononade Corporation v. United States*, 397 U. S. 72 (1970); the fireams business in *United States v. Biswell*, 406 U. S. 311 (1972); and to the mining industry in *Donovan v. Dewey*, — U. S. —, 101 S. Ct. 2534 (1981).

In these decisions, the Court has determined that:

> . . . a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner

of the commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. *Donavan v. Dewey, supra,* at 2539.

In the instant case, the Tenth Circuit Court of Appeals has improperly extended this doctrine to the logging industry despite the fact that said industry does not share the characteristics of the other enterprises which lead to the waiver of the warrant requirement. The logging industry is not evil of dangerous and does not satisfy the criteria articulated by the Court in *Donavon v. Dewey, supra,* which is cited above. This unilateral action on the part of the Tenth Circuit Court of Appeals, puts it in variance with the rulings of the United States Supreme Court, and grants the United States Forest Service carte blanche to inspect logging operations as it sees fit, with no restrictions whatsoever.

The Tenth Circuit Court of Appeals also relied upon a contract entered into by the petitioner's lumber company and the United States Forest Service to waive the necessity of a warrant in the instant case despite the fact that said contract was never introduced into evidence. The petitioner would submit that the blanket, unconditioned permission to inspect a logging company's operation which is a standard clause of a United States Forest Service's contract, violates the petitioner's Fourth Amendment rights. A standard and a mandatory contract clause does not constitute voluntary consent and furthermore does not protect the owner from the "unbridled discretion of executive and administrative officers". *Marshall v. Barlow's, Inc., supra,* 436 U.S. at 323 (1978). If this aspect of the Court of appeals ruling is allowed to stand,

governmental agencies can place such a standard clause in all of their contracts with private businesses and, in so doing, obtain the unrestricted ability to inspect businesses at their will or whim.

The case of *United States v. Katz,* 389 U.S. 347 (1967) sets a new course for Fourth Amendment law by initiating the concept that it is the person who is protected by the Fourth Amendment not a particular place. Many courts have interpreted this holding by the United States Supreme Court to reverse earlier decisions which interpreted the Fourth Amendment based upon common law property concepts or classifications. *U.S. v. Kim,* 415 F. Supp. 1252 (D. C. Hawaii, 1976); and *United States, ex rel. Gedko v. Heer,* 406 F. Supp. 609 (W. D. Wis. 1975).

Apparently, the Tenth Circuit Court of Appeals has not so interpreted. *United States v. Katz, supra.*

In rendering its decision in the instant case, the Court placed a great deal of emphasis on the fact that the activities observed by the Forest Service agents did not occur within the defendant's residence of within the curtilage of said residence (opinion page 8). A review of the post-*Katz* decisions reflects this ambiguity on the part of other United States Courts. The effect of the *Katz* decision on the common law property approach to Fourth Amendment law needs to be resolved.

Judge Kane's decision to grant the petitioner's Motion to Suppress Evidence, was based upon the unique surroundings, history and customs of the community in which the search took place. Specifically, Judge Kane stated that people living in the San Luis Valley enjoy a heightened sense of privacy and respect for the concept

of private property and therefore their reasonable expectation of privacy would differ from someone living in Toledo, Ohio (transcript pages 158-159).

The Tenth Circuit Court of Appeals summarily rejected this analysis of Judge Kane by stating:

> We do not believe that those living in the mountains of Colorado have a greater right to expectations of privacy than do citizens in other parts of the country.

This inflexible approach on the part of the Tenth Circuit Court of Appeals does not conform with the spirit of the *Katz* decision and is in variance with a multitude of other cases including *United States, ex rel. Gedko v. Heer, supra,* in which it is stated:

> An examination of the lower court decisions reveals that the determination of the reasonableness of any asserted expectation of privacy turns on the court's evaluation of the particular circumstances surrounding the incident. *Id.* at 613.

Judge Kane, took this rule of law one step further by ruling that the culture, customs, and particular history of a community may also be taken into consideration. This court needs to decide where these factors may be taken into consideration in determining whether or not an individual enjoys a reasonable expectation of privacy.

REASONS FOR GRANTING WRIT

This Court needs to resolve the following issues:

A. Was the Tenth Circuit Court of Appeals correct in grouping the logging industry with other businesses or

enterprises, the inspection of which does not require warrant.

B. Does a clause in the contract between the petitioners' lumber company and the United States Forest Service which permits the Forest Service to make spot inspections of the lumber company violate the Fourth Amendment to the United States Constitution.

C. Does the case of *United States v. Katz* reverse earlier rulings which articulated a common law property approach to Fourth Amendment law.

D. May a trial court, in ruling on a Motion to Suppress, take into consideration the particular customs, characteristics, and history of a given community in determining whether or not an individual enjoys a reasonable expectation of privacy.

Respectfully submitted,

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APPENDIX A

PUBLISH

No. 80-2247

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

BILL RUCINSKI, and ALFRED MEDINA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D. C. No. 80-CR-147)

(Filed August 31, 1981)

Marianne Wesson (Joseph Dolan, United States Attorney, with her on the brief), Assistant United States Attorney for the District of Colorado, Denver, Colorado, for Plaintiff-Appellant.

Jonathan L. Olom of Marks & Olom, Denver, Colorado, for Defendant-Appellee, Alfred Medina; Sander Karp of Karp, Goldstein & Stern, Denver. Colorado, for Defendant-Appellee, Bill Rucinski.

Before McWILLIAMS and DOYLE, Circuit Judges, and TEMPLAR*, District Judge.

PER CURIAM

In a two-count indictment, the defendants Bill Rucinski and Alfred Medina were charged with the theft of government property in violation of Title 18, United States Code, Section 641[1]; defendant Medina was charged in both counts, defendant Rucinski in the second count alone. Defendant Rucinski filed a pretrial motion, adopted by defendant Medina, for the suppression of certain real

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*Honorable George Templar of the United States District Court for the District of Kansas, sitting by designation.

1. Section 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoeevr receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value or cost price, either wholesale or retail, whichever is greater.

evidence and testimony of a statement given by Rucinski. After holding an evidentiary hearing, the court below granted the defendants' motion. In addition, the court below granted the defendants' motion. In addition, the court below severed the trials of the two defendants. The court's stated reason for the severance was the existence of an incriminating statement of defendant Rucinski, but the court also ruled that the Rucinski statement would be suppressed as a "fruit" of illegal surveillance. By Notice of Appeal, the United States signified its intention to seek appellate review of the orders of the court below. 28 U. S. C. § 1291.

The facts, as claimed by defendant Rucinski, are these:

In March of 1979, an investigation was started by the United States Forest Service concerning some possible irregularities in the scaling of cut timber by the Jackson Lumber Company. Officials of the United States Forest service had received reports that Jackson Lumber Company was manipulating the reports of timber cutting at the Treasure Pass Timber Scale. "Scaling" is a term of art in the timber business which describes the volume that a cut log may produce in board feet. Live logs are worth considerably more than dead logs, and the essential allegations of this case involved the manipulation of live logs and deal logs so as to deprive the government of the value of live logs which had been cut by Jackson Lumber Company on the Treasure Pass Timber Scale.

Paddy Ryan, a United States Forest Service official, first became aware of these reported irregularities in March of 1979. In September of 1979, when Jackson

Lumber Company resumed work on the Treasure Pass Timber Sale, the investigation started up again. This investigation led to the events of September 12, 1979, which are at issue in this case.

After the Forest Service received this information, they decided to conduct a telescopic and photographic surveillance of the Jackson Lumber Company.

The Jackson Lumber Company is a privately owned lumber company[2] located in an isolated valley in South Fork, Colorado. The lumber company mills timber which is largely obtained from the United States Forest Service. Public access to the Jackson Lumber Company is only allowed on business, and there is only one road into and out of the lumber company, this being the access road which runs off of State Highway 160.

Half way up the road which leads to the main business office and the residence of defendant Rucinski is a gate and a sign which says, "No Admission Except on Business." Rucinski's residence is adjacent to the main lumber company office. The area is posted with no trespassing signs, and the entire lumber company is surrounded by a barbed wire fence. The general public does not have access to the lumber company without the consent and permission of the owner. Any person desiring access must stop at the office and receive permission to enter the mill and business area.

The south side of the Jackson Lumber Company is bounded by the BAR Cattle Company. This is private

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2. Defendant Rucinski and his wife are owners of Jackson Lumber Company. Defendant Medina is an employee.

land, which is part of a ranch managed by Mr. Clinton Landon. On September 5, 1979, Charlie Burd of the Forest Service approached Mr. Landon and asked for his permission to go onto the BAR land. Landon and Burd had been acquainted for several years.

Burd's reason for requesting permission to go on the BAR land was so that he could set up the surveillance of the operations of the Jackson Lumber Company, but he did not tell Mr. Landon what his purpose would be.

In addition to the foregoing, the record discloses that the evidence against the defendants, and suppressed by the trial court, consists of the observations of agents of the United States Forest Service, who observed the defendants in the act of manipulating the contents of loads of lumber purchased from the Forest Service in order to avoid paying for higher-priced live lumber by substituting cheaper dead logs. The activities took place in an open outdoor millyard, enclosed only by a barbed wire fence. The millyard is situated in a valley and consequently may be observed from several local vantage points. Their observations were aided by a "spotting scope" (a telescope-like instrument) and a camera with a telescopic lens. The agents used the camera to photograph the activities that they observed.

It also appears, and the defendant admitted, that in order to purchase government timber, the Jackson Lumber Company was required, by contract, to permit the Forest Service "scaling" personnel to arrive unannounced at random intervals and inspect the logging business. This inspection was for the purpose of detecting irregularities or fraud in the defendants' logging operation.

The district court in its spoken opinion explained its ruling with the statement that the testimony had made clear what a "reasonable expectation of privacy is in the mountains of Colorado" and that the law enforcement activity, although perhaps legitimate in other environs, violated that expectation because "living in that community is based on a heightened sense of privacy and a heightened sense of respect for the concept of private property."

Having obtained access to the land of the BAR Cattle Company on September 12, 1979, Burd and Ryan went upon the land to set up the surveillance. They positioned themselves some distance from the Jackson Lumber Company, a distance which was variously estimated as 800 to 1,000 feet. They took with them a telescope of 50-60 power, and a Pentax Camera with a 500 mm lens and a 2x tele-converter, which, when interposed between the lense and the camera body, creates a magnification of 1,000 mm. This leads to magnification of 20 power, that is to say, objects are magnified 20 times larger than the human eye would normally see.

Ryan took up surveillance with the telescope, while Burd manned the camera. The agents concealed themselves so that they could not be seen by personnel at the Jackson Lumber Company. They did not have permission from anybody at the Jackson Lumber Company to conduct this surveillance.

The telescope was used to see if logs coming into the lumber mill were live or dead, and to read the numbers on the sides of the logs. Ryan needed the spying scope

to see the numbers written on the sides of the logs which identified where the logs came from. The camera was used for the same purpose, and Burd used the camera and its magnification equipment as a telescope to tell live logs from dead logs and to observe the numbers painted on the sides of the logs. The camera was also used to take numerous pictures of logging operations which pictures were also suppressed.

We now reach the pivotal issue in the case. Was there a violation of defendants' Fourth Amendment rights which would require not only the suppression of the photographs taken by the agents but also the suppression of evidence of what their observations disclosed without the aid of the telescopic and photographic equipment?

Agents' Presence on BAR Cattle Company Land

Defendants argue that somehow the agents conducting the surveillance were guilty of reprehensible deceit in obtaining permission to go upon the BAR Cattle Company property and that they, in fact, became and were trespassers at the time the observations and the photographs were made. There is no claim that the agents were at any time on Jackson Lumber Company property. Nor does the court consider the agents to be trespassers on BAR Cattle Company land. It would be a strange requirement indeed if agents of the Forest Service must broadcast to the countryside the purpose of a surveillance undertaken to protect a federal interest. They had permission, not by any misrepresentation, although Mr. Landon testified he would not have granted permission had he known the total objective of their photography. This does not nullify the permission he did give. The BAR

Cattle Company is not seeking to suppress the evidence and his statement that he would not have granted permission to make the inspections had he known the purpose is purely a neighborly afterthought.

Furtherance of Federal Interest

The defendants place emphasis on the fact that this lumber operation was located a distance from the highway, in a valley where it could not be observed except by means of a private roadway. Admission to the premises could be obtained only from the office along the private road and then only by a person having business there.

Defendant argues that a warrantless surveillance of his property was not permissible because the timber contract he had with the government did not specifically authorize an inspection of the type which occurred in this case.

It should be realized that, contrary to defendants' right to the expectation that they would be free from government representatives inspecting their operation, Jackson Lumber Company was under a contractual obligation, as a provision of its timber purchase contract with the United States, to permit Forest Service "scaling" personnel to arrive, unannounced and at random intervals, and to make inspections for the purpose of detecting irregularity or fraud in the operations of timber contractors. So an unannounced inspection by the agents was something to be anticipated at any time. It was not a condition that the inspections might be made directly on the premises of the Jackson Company. Effective inspection might be made in the manner employed by the government representatives. The type of inspection chosen

was apparently what the agents considered to be the most effective.

Defendant urges that the dwelling of defendant was located in the vicinity of the premises photographed and observed, but we find no claim that photographs were taken or that telescopic observations were made of the defendant's dwelling. The photos and observations were made of an area on which the logging operations were conducted, consisting of an open area surrounded by a barbed wire fence which did not interfere with the view of one taking photos or making observations of what could be plainly seen. Nor were the logs observed within the curtilage of defendant's residence because the logs were not for their use and enjoyment and were not an adjunct to the domestic economy of the family. *Fullbright v. United States*, 392 F. 2d 432 (10th Cir. 1968).

It cannot be disputed that there is a substantial federal interest in preventing the theft of government property from a national forest. It is important that this interest be protected to prevent the substitution of live logs for dead logs. The need for an unannounced inspection to detect irregularity or fraud in operations of timber contractors is apparent. An unannounced inspection was consented to by defendant so he cannot effectively complain that the inspection was one he did not contemplate. *Cf. Zap v. United States*, 328 U. S. 624.

The defendant submits that the recent case of *Donovan v. Dewey*, — U. S. —, 101 S. Ct. 2534 (1981), specifically determined that an inspection of commercial property without a search warrant is prohibited under the Fourth Amendment unless there is a regulatory scheme of legislative authority providing for a warrantless search.

We believe that defendant undertakes to construe the application of *Donovan* more narrowly than its language justifies. The decision does analyze the current limitations which the court has placed on the inspection of commercial property.

We do, however, note that the Supreme Court took occasion to add that the inspections of commercial property *may* be unreasonable if not authorized by law *or are unnecessary for the furtherance of federal interests,* 101 S. Ct., at 2538. (Emphasis supplied.) Here, we believe the inspection made of the logs harvested from a national forest to determine whether theft of live logs was occurring was indeed a federal interest to be protected. No property was seized; none was even molested. The objects observed were in plain view and under circumstances in which the defendant cannot contend that he could not anticipate the observations which were made. The defendant could not help being aware that the logs he had harvested under his contract with a government agency would be subject to unannounced inspections undertaken for the specific purpose of determining whether any manipulation of sample loads of logs was taking place. *Donovan v. Dewey, supra.* Nor was this inspection so random, infrequent, or unpredictable that defendant, for all practical purposes, had no real expectation that the logging operation would not be subjected to unnanounced inspections from time to time by Forest Service officials. *See Marshall v. Barlow's, Inc.*, 436 U. S. 307, 323 (1978).

Donovan holds that while searches of private homes generally must be conducted pursuant to a warrant in order to be reasonable, the interest of the owner of com-

mercial property is not one in being free from any inspections. The Fourth Amendment protects the interest of the owner of property in being free from unreasonable intrusions onto his property by government agents. There was no unreasonable intrusion here.

We have reviewed the several decisions in which surveillances of residences, apartments, business premises, offices and rooms, without a search warrant, have been consistently condemned. But, as stated in *Rakas v. Illinois*, 439 U. S. 128, 134, "Capacity to claim protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." We are persuaded from the facts before us that the millyard of Jackson Lumber Company, surrounded by nothing more opaque than a barbed wire fence, could scarcely be compared with those situations in which dwellings and structures occupied by persons having the expectation of privacy are protected from surveillance. Here, defendants could have no such expectation. The inspection was an event which could occur at any time chosen by the Forest Service agents without notice.

The fact that the agents used binoculars and a telescopic lens camera to magnify what they observed from adjoining properties does not change the application of the rules permitting search where the observation is lawfully made. *See* cases collected in annotation at 48 A. L. R. 3rd, 1178, and 68 Am. Jur. 2d, *Searches and Seizures*, § 25, at 681.

The burden of establishing that the search involved a protected area was on the defendant. We hold that he

has failed to establish that fact. *Fullbright v. United States, supra.*

We believe that the order of the trial court suppressing all the evidence offered by the government in the prosecution of this case, including the photographs taken, the things observed by the use of a telescope and by the naked eyes of the agents, and the statements made by this defendant when he was shown the government's evidence, was clearly erroneous under all the facts. We do not believe that those living in the mountains of Colorado have a greater right to expectations of privacy than do citizens in other parts of the country.

The order of the trial court suppressing the evidence is vacated and the cause is remanded.

APPENDIX B

JULY TERM—September 24, 1981

Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges, Honorable George Templar, District Court Judge*.

No. 80-2247

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

BILL RUCINSKI and ALFRED MEDINA,

Defendants-Appellees.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

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*Of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 80-2247

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

BILL RUCINSKI, and ALFRED MEDINA,
Defendant-Appellees.

REQUEST TO TRANSMIT THE RECORD
ON APPEAL TO THE
UNITED STATES SUPREME COURT

COMES NOW the defendant-appellees by and through their respective attorneys, Jonathan L. Olom of MARKS & OLOM, Denver, Colorado, and Sander N. Karp of KARP, GOLDSTEIN & STERN, Denver, Colorado, and hereby requests this Court to certify the record on appeal to the Supreme Court of the United States in accordance with Rule 19 (1) of the Supreme Court Rules.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

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APPENDIX D

THE COURT: First of all, I am going to make rulings in the reverse order.

With respect to the suppression for failure to give Miranda warning, I don't think that any was required under the circumstances.

As readily admitted, it was not a custodial inquiry. Secondly, I am quite satisfied from the testimony of Paddy Ryan that he participated in, in fact insisted on this because of the importance of recognizing the integrity of his friendship with Mr. Rucinski; and more important in that regard to me is the fact that Mr. Bird, who was in charge of this investigation, was trained too as an FBI agent before joining the Forest Service, was trained in interrogation; and, in fact, that was his assignment and responsibility. This was something Mr. Ryan requested, I think because of his friendship for the defendant; and I don't see there is any need to even consider at this point some sort of supervisory power over the Government agent for failure to make a warning such as is suggested, that it is an ethical or administrative problem.

Insofar as the motion to suppress is based on a failure to advise or to ask the Court to exert any kind of supervisory power, suppress those statements, it is denied.

What I am about to say with regard to the motion to suppress may not be appreciated by any member of the Supreme Court, except Justice White; and perhaps the Arizona roots of Rehnquist may make what I am

going to say a little bit more understandable; but I think that the testimony of Clinton Landon is highly significant, not for the reasons argued.

It is suggested that the Government agents obtained permission to be on the land by false pretensions; and I agree with Ms. Wesson that they didn't—there was no positive statement. If this were 10B5 case, they could be liable.

There is an intentional withholding of information, which, if known, in the light of those facts, would clearly have obtained a different result; and that it what I think the significance of the testimony is of Mr. Landon extraordinarily forthright and honest individual testified precisely to what he did and why he did it; but more importantly, he pretty much made clear what a reasonable expectation of privacy is in the mountains of Colorado; and I don't think it is absurd for one to think that they have an expectation of privacy in a valley where the only access—legitimate access is from a roadway with signs posted and where access was obtained from a higher elevation 8000 feet away because the reasonable expectations of people living in that community is based on a heightened sense of privacy and a heightened sense of respect for the concept of private property.

That is clearly shown by the conduct of the Forest Service officials themselves who asked for permission before going on the land. This is, in addition, land in the San Luis Valley and the Court can take judicial notice of litigation in the San Luis Valley where landowners there in this court tried time and time again in disputes there to say even more so the expectation of privacy on property is heightened.

It cannot be judged by comparing it to a street corner in Toledo, Ohio. It cannot be judged by comparing it to a stop and frisk in the metropolitan area of Colorado. It is something that is so deeply engrained and is to be respected that I find that the reasonable expectation of privacy is something that need not even be subjected, but is known or should be known by anyone; and clearly demonstrably known by all people involved in this particular case. As well for Mr. Medina as Mr. Rucinski, the expectation of privacy is there.

Now, I think we have to consider what really this law is supposed to be about. This was—and is—highly sophisticated equipment and I don't see any distinction between the use of photographic equipment of this nature. It is not readily, while it can be purchased—the price of it is such that it is equipment of a highly specialized use; but I don't see any distinction between that and lifting sound, as was done in *Katz v. United States;* and I think the distinction drawn by Mr. Karp in this brief with *Fullbright v. United States* is a valid distinction. It is not a question of assisting the naked eye to see as it was in the *Fullbright* with the use of binoculars; but it is rather a serious and significant means of obtaining evidence for the prosecution of criminal cases and deliberately prepared and designed for that.

And that brings me to the focal point of all search and seizure law and it goes to *Aguilar v. Texas.* There are absolutely no exigent circumstances which justify, in my view, this kind of conduct without first obtaining a warrant. If there was, indeed, probably cause for agents of the Forest Service to go to Mr. Langon and obtain permission to get on his land and there was probable

cause to use equipment designed solely—or not solely, but certainly designed brilliantly for the obtaining of evidence to prosecute a criminal case, all of these things suggest without any question that the rights of privacy, the expectation of privacy should have been respected to the extent that application to an impartial judicial officer, such as a magistrate, should have been obtained first.

Again, as I say, no matter of exigent circumstance and if there was some showing that there wasn't time to do this, I would, in all likelihood, view this matter differently; but as was said in *Fullbright,* the court said, "By this we do not mean to say that surveillance from outside on curtilage under no circumstances could constitute an illegal search in view of the teachings of the *Katz v. United States.*"

Well, I think this is what goes through that open door. I think given the environment in which the people involved lived, given the geographical circumstances, given the necessity to go onto other private property in order to establish this, given the use of highly sophisticated equipment which has limited use, given the fact that this equipment was used to obtained evidence with prosecution in mind; and given the fact that there was no immediate or exigent circumstance requiring that this be done without resort to the courts to obtain a warrant, that the search warrant was indeed illegal and unreasonable.

With that, the photographs are suppressed and it is clear to me that in addition the statements made by Mr. Rucinski at his home when confronted with these photographs were fruits of an illegal search and seizure; and for that reason, they, too, are suppressed.

The statement would not be admissible against Mr. Medina under any circumstance; but I don't think I need to rule on the motion for—well, yes, I do. The motion for severance is granted. Even if admissible, those statements would not be admissible, in my view, against Mr. Medina.

Therefore, it is the order of the Court that for the reasons stated that the photographs offered in evidence are suppressed against both Mr. Rucinski and Mr. Medina; that the statements made by Mr. Rucinski are not admissible against Mr. Medina; and, therefore, a severanvce is ordered and that the statements made by Mr. Rucinski are not admissible against him because they the fruits of an illegal search and seizure, as previously described.

I deny relief on the grounds offered to suppress the statements of Mr. Rucinski for failure to give Miranda warnings; and I deny relief on the grounds asked for to exercise some kind of supervisory control over these agents.

Are there any questions?

MR. TORRES: None, your Honor.

MR. OLOM: Am I correct in assuming that the ruling of the Court would extend to any testimony based upon observations through the high-powered devices, as well?

THE COURT: Oh, yes.

MR. OLOM: Very well.

THE COURT: It is the use without first obtaining the warrant when one was easily obtainable, if there was probable cause independent of that activity.

MR. OLOM: The only other request I would have is if I could be excused. I have a Court of Appeal argument at nine o'clock in the state court which is moot by lack of—

THE COURT: I will hold recess right now.

(The hearing was then concluded.)

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Opposition

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No. 81-859

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILL RUCINSKI AND ALFRED MEDINA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that government agents violated their rights under the Fourth Amendment when they used binoculars and a telescopic lens camera to observe the millyard of a lumber company from adjoining properties.

Petitioners were charged in a two-count indictment returned in the United States District Court for the District of Colorado with theft of governmental property, in violation of 18 U.S.C. 641. Petitioner Medina was charged in both counts and petitioner Rucinski in the second count alone. On motion of the petitioners, the district court suppressed all evidence obtained by law enforcement officials by means of use of vision amplifying equipment to observe and photograph the millyard of petitioners' lumber company from adjoining properties. It found that petitioners' rights were violated because the reasonable expectation of privacy in the area in which they resided "is based on a

heightened sense of privacy and a heightened sense of respect for the concept of private property" (Pet. App. 15-19). The court of appeals reversed (Pet. App. 1-12).

Petitioners contend (Pet. 5-9) that the court of appeals erred in reversing the district court's order suppressing the evidence. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress the evidence. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384-388 (1893); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1981-12